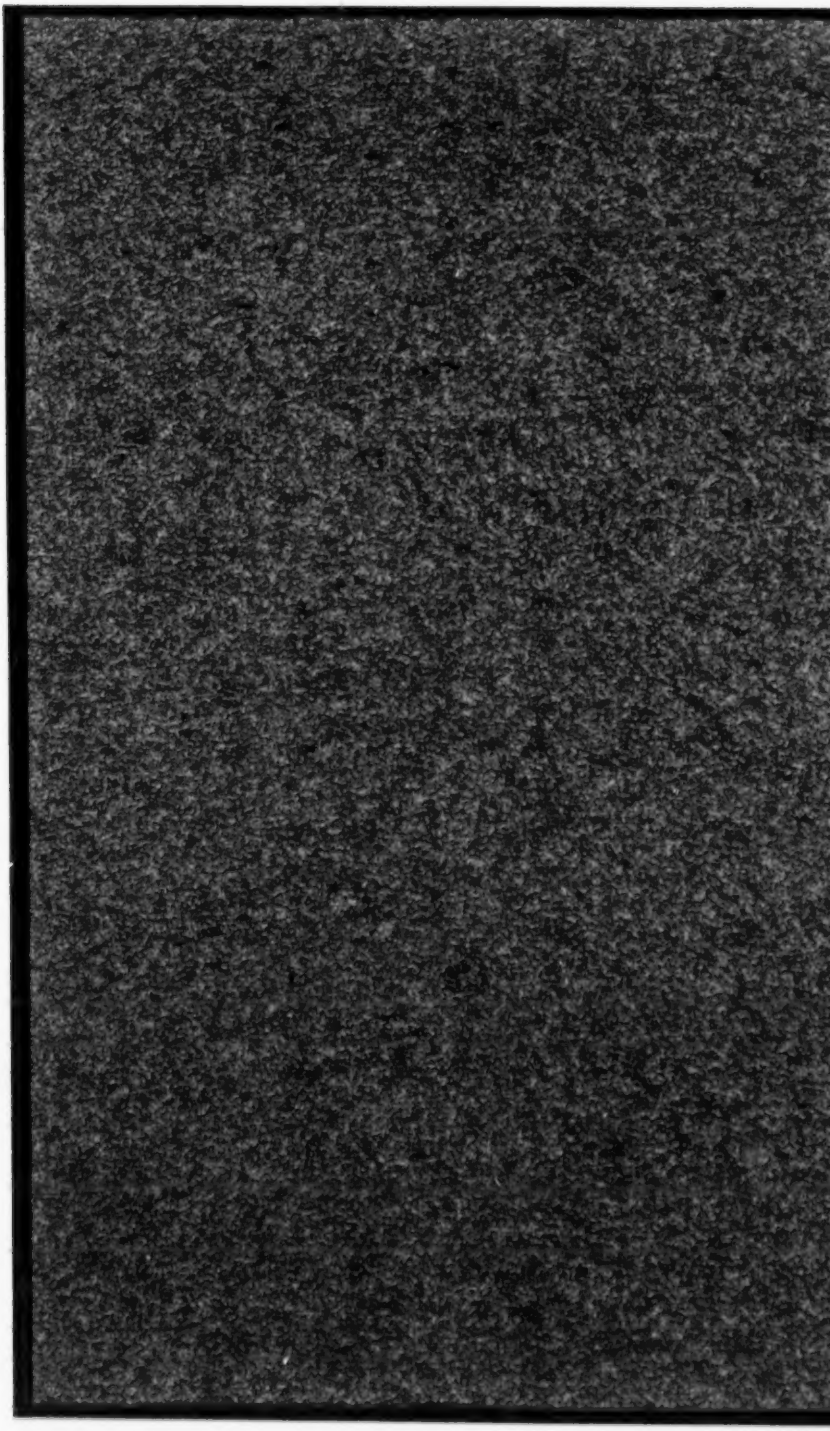

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923.

No. 883.

ROSCOE IRWIN, Former Collector of Internal Revenue for the 14th District of New York,

Petitioner,

against

E. PALMER GAVIT,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

STATEMENT.

This is an application on behalf of the former Collector of Internal Revenue for the 14th District of New York for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals which affirmed a judgment in favor of the respondent recovered in the District Court of the United States for the Northern District of New York. (R. 36, 67.)

The action was brought by E. Palmer Gavit, the respondent, to recover from Roscoe Irwin, Collector of

Internal Revenue, 14th District of New York, the petitioner, certain income taxes and penalties assessed against individual income of the respondent under the Act of Congress of October 3, 1913, for the years 1913, 1914 and 1915, which were paid by the respondent under protest to said collector. (R. 2-34.) To this complaint the petitioner demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. (R. 34.) This demurrer, after argument, was overruled by the District Court and thereafter judgment was entered for the amount demanded in the complaint with interest and costs. (R. 35-36.) To such judgment, petitioner obtained a writ of error to the United States Circuit Court of Appeals, Second District, which affirmed the judgment, as aforesaid. (R. 50, 67.) The opinion of the District Court is reported in 275 Fed. Rep., 643, and that of the Circuit Court of Appeals is not yet reported.

Facts.

The complaint sets forth in detail in separate causes of action, the taxes and penalties assessed against Mr. Gavit and the payments made by him under protest. (R. 2-22.) The total amount of taxes and penalties so paid was twenty-one thousand six hundred and two dollars and sixteen cents ($21,602.16), and for this amount, together with interest, a judgment was demanded. (R. 22.)

It is alleged in each cause of action that various income tax returns for the respective periods were filed by the respondent with the collector, and that in each return he made the specific claim that all sums received by him from the Estate of Anthony N. Brady which were designated in said return, were a bequest and not income and not taxable and duly protested against any

tax being levied thereon. That the balance of his income exclusive of such bequest was not taxable within the provisions of said Act of Congress of October 3, 1913. That thereafter respondent received from time to time notices of and demands for the payment of said taxes claimed to be assessed upon his individual income, copies of said notices and demands being attached to the complaint. That he duly paid these taxes under protest and under duress, and with each payment filed a written protest, claiming that said tax was erroneously, illegally and wrongfully assessed against him in that said tax was based upon sums received by him during the period in question from the Estate of Anthony N. Brady, were not income and therefore, not taxable. That said tax was not a proper tax upon his income and was contrary to the letter and spirit of said Act of Congress of October 3, 1913. That respondent took various appeals to the United States Commissioner of Internal Revenue for the remission of the penalties and for the refunding of the taxes and penalties paid, upon the same grounds as stated in his protest. That these claims were disallowed and rejected. That the amounts set forth in the complaint as paid by the respondent were due and owing to him from the petitioner. (R. 2-22.)

There was annexed to and made a part of the complaint the seventh paragraph of the will of Anthony N. Brady in which is set forth the bequest to the respondent. (R. 25-27.) This paragraph provides as follows:

> "Seventh. All the rest, residue and remainder of the real and personal property of which I may die, seized and possessed, I direct my executors and trustees to divide into six equal parts and I give, devise and bequeath the same as follows:
>
> * * * * * *

One part, to my executors and trustees, in trust nevertheless for the following uses and purposes, to wit: To collect and receive the rents, income and profits thereof and after paying all necessary expenses to dispose of the net rents, income and profits thereof as follows: I direct my executors and trustees to apply so much of said net rents, income and profits as they in the exercise of their absolute discretion, shall deem proper for the maintenance, education and support during her minority, of my granddaughter, Marcia Ann Gavit, and I direct my executors and trustees in fixing the amount of said allowance to consider the station in life of my said granddaughter, my desire being that she shall be amply and liberally provided for in every way. All income to be applied to the maintenance, education and support of my said granddaughter may be either so applied by my executors and trustees directly, or may in their discretion be paid by them to the guardian of the person of said minor, and the receipt of such guardian shall be full and complete discharge to them for all moneys so paid by them to such guardian. The balance of said net rents, income and profits shall be divided into two equal parts: One of the said parts shall be paid to my son-in-law, Erastus Palmer Gavit, in equal quarter yearly payments during his life. The other moiety shall be accumulated for the benefit of my said granddaughter. Upon the death of my said granddaughter before she attains her majority, whether her father be then living, or not, I give, devise and bequeath the capital of said trust estate to her issue in equal shares, per stirpes, and if she leaves no issue, whether her father be then living or not,

I give, devise and bequeath said capital to my issue, share and share alike, per stirpes. When my granddaughter attains the age of twenty-one years, whether her father be then living, or not, and whether she then has living issue, or not, I direct that said trust shall cease, and I give, devise and bequeath the capital of said trust estate to my said granddaughter, her heirs and assigns forever."

POINT I.

The sums received by E. Palmer Gavit, respondent, under the will of Anthony N. Brady, deceased, were a bequest or gift, and not income, and no income tax should be imposed thereon under the Act of Congress of October 3, 1913.

The petitioner, by his demurrer, raised solely one question which is the only question before the court, namely, were the sums received by Mr. Gavit from the Estate of Anthony N. Brady under his will, income or were such amounts a bequest or gift? If income, the income tax was properly assessed against same and the demurrer should have been sustained. If a gift, or bequest and not income, these amounts were not taxable and the demurrer was properly overruled.

During the period in question, the Act of 1913 was in force and the provisions of that Act, as far as applicable to the present case, are as follows:

"Section II:

"A. Subdivision 1. That there shall be levied, assessed, collected, and paid annually upon the entire net income arising or accruing from all

sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of one per centum per annum upon such income, except as hereinafter provided * * *.

"Subdivision 2. In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of one per centum per annum upon the amount by which the total net income exceeds $20,000 and does not exceed $50,000." (Here follows percentages of additional tax.)

* * * All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section."

"B. That * * * the net income of a taxable person shall include * * * gains or profits, and income derived from any source whatever, including the income from, *but not the value of* property acquired by gift, bequest, devise, or descent." (The italicized words are omitted from the quotation in petitioner's brief, page 6.)

"D. * * *; guardian, trustees, executors * * *, and all persons, * * * acting in any fiduciary capacity, shall make and render a

return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals; * * *.

"E. * * *, All persons, * * * in whatever capacity acting, including * * * trustees acting in any trust capacity, executors * * * having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, * * * or other fixed or determinable annual gains, profits, and income of another person, exceeding $3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. * * *"

It is important first to consider just what Mr. Gavit received under the will of Anthony N. Brady. The intent of the portion of the will quoted is very clear and definite. That is, the respondent was bequeathed a certain portion of the increase of the estate of the testator for a definite period; that is, until the granddaughter of the testator, Marcia Ann Gavit, who is the daughter of the respondent, attained the age of twenty-

one years at which time the entire one-sixth part of the trust estate bequeathed under said portion of the will was given to her absolutely. The gift to Mr. Gavit is further limited by the life of said Marcia Ann Gavit, as the will provided that if said granddaughter, prior to attaining the age of twenty-one, died, respondent was to receive no further sum whatsoever under the will as the entire trust estate went to the issue of said Marcia Ann Gavit, if any, otherwise to the testator's issue.

What, then, did Mr. Gavit receive from the estate of Anthony N. Brady? A legacy and a bequest are held to be synonymous terms and are properly used to distinguish a gift of personalty made by a testator from a devise which is a gift of realty. (In re Campbell's Estate, 75 Pac. Rep., 851, 853.) A bequest is a conditional or unconditional voluntary disposition of personal property by will. (Merriman v. United States, 282 Fed. Rep., 851, aff'd United States Supreme Court, U. S. Adv. Ops., 1923-1924, at 48.) Under these well recognized definitions, it cannot be held that Mr. Gavit did not receive a gift or bequest under the will of Anthony N. Brady, because it can be nothing else.

It is urged, however, that because, instead of receiving a definite sum or a definite portion of the corpus of the estate, he received part of the increase, his gift ceased to be a legacy and became income. This contention we believe is unsound when we bear in mind that we are considering this proposition, not from the viewpoint of the estate or the testator's executors and trustees, but from the viewpoint of Mr. Gavit.

There is ample authority for our contention that as far as a beneficiary is concerned, the fact that the gift he receives from a testator is measured by the increase of the corpus of the estate, does not change the status of his position and what he receives, continues to be a legacy or bequest and he continues to be a legatee.

In Disston v. McClain (147 Fed. Rep., 114), a trust was created under a will from the income of which a beneficiary was to receive fifteen thousand dollars annually, the principal of the trust reverting to other parties on the beneficiary's death, and the court clearly stated that this gift was a bequest to the beneficiary.

In United States v. Fidelity Trust Company (222 U. S., 158), which overruled Disston v. McClain, just cited, in regard to the time when the enjoyment of the interest of the beneficiary actually began, this court recognized that amounts paid periodically to a beneficiary were legacies to her.

In Westhus v. Union Trust Company of St. Louis (164 Fed. Rep., 795), and Lynch v. Union Trust Company of St. Louis (164 Fed. Rep., 161), where the same question arose as to the time when the interest of a beneficiary vested which was to be paid to him out of the interest of a trust fund, the court in the opinions stated that the beneficiary received a bequest or a legacy and referred to such beneficiary as a legatee.

While these cases last cited involve another statute not applicable here, they are called to the court's attention to emphasize the fact that as far as the beneficiary is concerned, amounts received by him out of the increase of the corpus of the testator's estate are a gift or bequest and not income.

In Matter of Stanfield (135 N. Y., 292), where an executor under the will of a testator, was directed to invest a sum of money and pay the income to the testator's son for life and at his death the principal to a third party, the Court of Appeals specifically held that this gift constituted a legacy to the beneficiary.

This last case is not cited as authority on the tax question here before this court, but as to the construc-

tion given by a high court to a similar gift, so that what is said in petitioner's brief (page 7) has no application.

Assume, for instance, in this case that the testator had directed one hundred fifty thousand dollars to be paid to the respondent in fifteen annual installments which would be approximately the period as in this case since Marcia Ann Gavit was six years old at the time of the testator's death, there is no question but that such gift would be considered as a bequest. Assume further, that the testator had divided his estate into six equal parts and directed his executors to pay to the respondent a portion of one of said parts in fifteen equal annual installments. It still could not be urged that this was not a bequest and it would have mattered not as far as the beneficiary was concerned whether the executors had obtained these installments from the corpus of the testator's estate at the time of his death or from any accumulations thereon. In either case, as far as the beneficiary was concerned, he would be in receipt of a bequest and not income.

It follows logically from this last assumption to the present case where the testator provided that instead of giving any part of the corpus of his estate to the respondent, he directed that a certain percentage of the corpus should be set aside and that the respondent should receive a certain portion of the interest on such trust fund for a period ending when his daughter attained the age of twenty-one or upon her death, if she died before reaching that age. Certainly, the respondent is in no different position, had he received money from an estate under any of the assumed cases. It was solely a gift from the testator which came to him during the period of not to exceed fifteen years. The fact that the amount was not definitely known and was measured by a different method than a fixed percentage of the corpus of the estate, cannot alter the character of this gift as a bequest.

The case of Smietanka v. First Trust and Savings Bank (257 U. S., 602), in which it was held by the Supreme Court of the United States that income from a trust fund for the benefit of unborn and unascertained beneficiaries was not made taxable by any language in the income tax law of October 3, 1913, was cited as authority here that the bequest received by Mr. Gavit was income, because the statement is made in the opinion in that case that "there was nowhere in the act a payment required of a fiduciary of a tax upon the income of the estate or trust property, the income from which he collects, except as it is to enure to the benefit of a person or an individual from whose income he is authorized and required to deduct the normal tax thereon." (Page 605.) From this statement it was urged that there was in effect a holding that the sums received by Mr. Gavit in this case were not a bequest but income.

We insist that this decision is not authority for such contention that the bequest to Mr. Gavit was income. As the court below said: "That action was *not** brought against the unborn persons, so that whether or not the amount received was income as to them was not decided. The trustees were held entitled to recover the entire income tax, both normal and super tax, which they had paid." Furthermore, it is apparent from the decision that the corpus of the trust fund as well as the accumulations were to go to such beneficiaries, which presents an entirely different situation from the present case. Had Mr. Gavit been bequeathed one-half of the principal of the trust fund when his daughter became of age and in the meantime was to receive the interest and income on said principal, through the trustees, until

---

* Obviously omitted.

such time, an entirely different situation would be presented.

It is precisely this distinction that the District Judge pointed out when quoting from the Supreme Court of the United States (Eisner v. MacComber, 252 U. S., 189, 206, 207), he defines income as " the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets," and further quoting from the same opinion, stated: " The fundamental relation of ' capital ' to ' income ' has been discussed by the economists, the former being likened to the tree on the land, the latter to the fruit or the crop; the former being depicted as a reservoir supplied from springs; the latter as the outlet stream, to be measured by its flow, during a period of time." Bearing in mind this distinction, the District Judge called attention to the fact that none of the moneys received by Mr. Gavit arose from any capital of his, but from the capital or a portion of the estate of Anthony N. Brady which would never be that of the respondent. That Mr. Gavit had certain rights to this portion of the estate is true, but this right, as pointed out by the court, might be extinguished and to call such right property or capital was held unreasonable. (R. 42-44, 47-48.)

We failed to see any application in the case of Maguire v. Trefry, 253 U. S. 12, cited by petitioner (page 6). In that case a State statute which specifically taxed income received by a resident of Massachusetts from trustees, non-residents of that State, was held by this court to be constitutional. Here, we do not question the constitutionality of the statute, but merely contend that the statute does not cover this particular case. Whether or not Mr. Gavit could enforce the payment of his legacy in equity or elsewhere, is entirely immaterial.

What we wish to emphasize is Mr. Gavit's relations to the money which he received from the estate of Anthony N. Brady. As the court below said, whether or not these amounts are income as far as the trustees for the estate are concerned, matters not. It is Mr. Gavit who is seeking to recover a tax erroneously assessed as an income tax upon the amount of a bequest made to him. If the court is satisfied that this was a bequest to Mr. Gavit, and not income, under the Act of 1913, Section 2-B, this sum is expressly excepted in determining what his income is for the purposes of taxation as the act provides that the net income of a taxable person shall not include "the value of property acquired by gift, bequest, devise or descent." (Merriam v. United States, 282 Fed. Rep., at 855, affm'd United States Supreme Court, *supra.*)

Our contention is somewhat borne out by a statement made by this court in Knowlton v. Moore (178 U. S. 41), in construing the income tax of 1894, where the court said: "The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax since among the items going to make up the annual income which was taxed, was 'money and the value of all personal property acquired by gift or inheritance.'" (Page 52.)

Had this gift or bequest to Mr. Gavit come under the provisions of an income tax law similar to the Act of 1894, unquestionably the same must have been included in his income, but as he is taxed under the Act of 1913, this bequest is just as clearly excluded since the Act of 1913 as quoted above, excludes in practically the same language bequests which are included in the Act of 1894.

POINT II.

The income on this trust fund set aside under the will of Anthony N. Brady was not taxable under the Act of October 3, 1913.

A conclusive answer to the contention that although this gift might not be income as far as respondent himself was concerned, it was income as far as the estate was concerned and hence taxable, is that the income of an estate was not taxable under the Act of 1913 where there was no person in receipt of such income, simply as income.

The Act of 1913 can be searched in vain for any provision which makes such income taxable. Such a case as the present one is clearly omitted. The levy, assessment and payment is upon the net income of a "*citizen*" (Section A, subdivision 1). "*Individuals*" are charged with a normal income tax and every "*person*" subject to the additional tax must make a "*personal*" return (Section A, subdivision 2). The net income of a taxable "*person*" is defined. (Section B.) There is nothing in the Act which makes an "*estate*" a "*citizen*" or a "*person,*" and the income of an estate is therefore not taxable.

Congress evidently recognized that no income tax could be levied upon an estate under the Act of 1913, because under the Act of September 8, 1916, a provision was enacted which imposed an income tax upon an estate. We quote the pertinent portions of said Act of 1916 as follows (39 Stat. 756, Title I, Part I, Section 2):

> "(b.) Income received by estates of deceased persons during the period of administration or settlement of the estate, shall be subject to the normal and additional tax and taxed to their

estates, and also such income of estates or any kind of property held in trust, including such income accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests, and income held for future distribution under the terms of the will or trust shall be likewise taxed, the tax in each instance, except when the income is returned for the purpose of the tax by the beneficiary, to be assessed to the executor, administrator, or trustee, as the case may be;

Provided, That where the income is to be distributed annually or regularly between existing heirs or legatees, or beneficiaries, the rate of tax and method of computing the same shall be based in each case upon the amount of the individual share to be distributed.

Such trustees, executors, administrators, and other fiduciaries are hereby indemnified against the claims or demands of every beneficiary for all payments of taxes which they shall be required to make under the provisions of this title, and they shall have credit for the amount of such payments against the beneficiary or principal in any accounting which they make as such trustees or other fiduciaries."

While not conclusive, it is a very strong evidence of Legislative intent that when an amendment is made to a law, so as to include matters not embraced in the original act, the original act did not include such additional matters.

As the court below said, "The fact that the prior act is amended by the 1916 enactment, demonstrates the intent to change the pre-existing law and the presumption

is that it was intended to change the statute in all particulars touching which we find a material change in the language of the act (United States v. Bashaw, 50 Fed. Rep., 754; reversed in the Supreme Court on other grounds, 152 U. S., 456.)"

The Revenue Act of 1918 (40 Stat. 1057, Title II, Part II, Sect. 219a), and the Revenue Acts of 1921 (42 Stat. 227, Title II, Section 219a), specifically tax the income received by estates of deceased persons during the period of administration.

Referring to subdivision 2, Paragraphs D and E of the Act of 1913, under which it is provided that a guardian or trustee withhold a sum sufficient to pay the normal tax imposed under the act, petitioner argued in the court below that because of such provisions the income from a trust fund, such as here, became taxable. The court below clearly explained that "these provisions were undoubtedly inserted to safeguard the government in obtaining the income of persons from property which they have by gift, bequest, devise or descent, where the property is temporarily in the possession of fiduciaries. Oftentimes the beneficiary does not obtain the corpus or capital of the property which he received under the will until some time after the right thereto is created. During this period income accrues and the intent of the law is that the trustees shall render a return and pay the normal tax of persons subject to the tax. Here, the defendant-in-error is not subject to the tax and received no part of the corpus of the estate, so that the sections referred to, do not apply."

In Merchants Loan and Trust Company v. Smietanka (255 U. S., 509), the Supreme Court of the United States, in construing the Act of 1916, expressly held that by the provisions of the income tax law of that year (section 2-B) above quoted, a testamentary trustee is a

taxable person, indicating that it was only under such section that such trustee became taxable. In a later case Smietanka v. First Trust and Savings Bank (257 U. S., 602), explaining the decision just mentioned the court said: "In the Act of 1913, it would have been easy *to require a trustee to pay an income tax on income received by him* for unborn beneficiaries or *for the trust or the estate, but Congress did not do so.* In the next act it did so. We cannot supply the omission in the earlier act." (P. 607.)

This decision completely refutes the argument that under the Act of 1913 this tax might be assessed against the trust estate because as to such trust estate, the amount received was income, and the tax passed along, as it were, for Mr. Gavit to pay. As the income of this trust fund was not taxable under the Act of 1913, and as it ceased to become income when turned over to Mr. Gavit and was simply a bequest, the same was not taxable under said Act of 1913.

POINT III.

No convincing reasons shown for granting the petition.

It follows from the above points that the court below did not err in the construction which it placed upon section II-B of the Revenue Act of 1913, namely, that this particular bequest to Mr. Gavit was not taxable as income under said Act, and it is respectfully urged that no good reasons are shown for granting this application and prolonging this litigation. It is not contended that there are any claims for refund now pending under said Act of 1913 for which the present case can be used as a precedent, and the period has long since passed within which any such claims can be filed. Apparently, the sole reason presented by the Solicitor General is that a

decision be given by this court in this case so that the same can be used as a precedent in numerous claims for refunds where income taxes were paid by trustees or beneficiaries under beneficiary trusts, pursuant to the Revenue Acts of 1916, 1918 and 1921. As already pointed out, the Act of 1916 and subsequent acts radically changed the laws with reference to imposing a tax on the income received by trustees for trust estates so that nothing that can be decided here can be controlling in the construction of said acts. This is clearly indicated in the opinion of the court below. We can confidently assert that the government will in any subsequent litigation involving such later revenue acts, insist that the decision here has no bearing in such cases for the very reasons set forth in this brief. Since, therefore, this is an isolated case under the Act of 1913 in no wise bearing on the construction which may be placed on the later statutes of 1916, 1918 and 1921, the reason urged for granting this application has no force.

As far as any constitutional question is concerned, this is merely incidental. It was not urged in the court below and is not urged now that this act is unconstitutional. It was merely contended and upheld by the court that this money received by Mr. Gavit from the estate, even though it might be income as far as the estate was concerned, was not income as to Mr. Gavit, but was a bequest and not taxable and that which in its nature was not income, could not be made income by merely calling it such.

The court below, quoting from Smietanka v. First Trust and Savings Bank, *supra,* indicated how Congress could have taxed this income and called attention to its omission to do so. It was not, therefore, the want of power on the part of Congress, but the failure to act.

Conclusion.

As the money received by Mr. Gavit was a bequest and as this court has held that a bequest is not taxable under the Act of 1913 (United States v. Merriman, *supra*), and as this court has further held that income received by trustees was not taxable under said Act of 1913 (Smietanka v. First Trust and Savings Bank, *supra*), there is really no open question, the doctrine of *stare decisis* applies and the granting of this application is unnecessary.

It is respectfully submitted that this petition for writ of certiorari should be denied.

March 29, 1924.

NEILE F. TOWNER,
Counsel for Respondent.